90-1665

No. ———

Supreme Court, U.S.
FILED
APR 30 1991
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KIDDER, PEABODY & CO. INCORPORATED,
Petitioner,

v.

MAXUS ENERGY CORPORATION and
MAXUS CORPORATE COMPANY,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal district court, after fully and fairly adjudicating a federal claim in a manner that is also dispositive of a pendent state-law claim, must nevertheless dismiss the state-law claim if it has also been raised in a separate state-court proceeding.

LIST OF PARTIES

In addition to the parties listed in the caption, Martin A. Siegel and Ivan F. Boesky were defendants in the district court, and Ivan F. Boesky was an appellee in the court of appeals.

STATEMENT PURSUANT TO RULE 29.1

Pursuant to Rule 29.1 of the Rules of this Court, the following list identifies all of petitioner's parent companies and subsidiaries (except wholly owned subsidiaries):

1. General Electric Company
2. General Electric Financial Services, Inc.
3. Kidder, Peabody Group Inc.
4. Kidder, Peabody Sales Agency of Ohio, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Kidder, Peabody & Co. Incorporated ("Kidder") hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-18a) is reported at 925 F.2d 556. The opinion of the district court (App. 19a-24a) is reported at [1989-90] Fed. Sec. L. Rep. (CCH) ¶ 95,008. The judgment of the district court (App. 25a-27a), the injunction order of the district court dated July 18, 1990 (App. 28a-31a), and the injunction order of the district court dated July 23, 1990 (App. 32a-34a), are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1991. The court of appeals denied rehearing on March 14, 1991. (App. 35a-36a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. Kidder is a national brokerage firm. In 1983, Kidder was retained by Diamond Shamrock Corporation ("Diamond Shamrock") to provide financial advice regarding a possible acquisition of Natomas Company ("Natomas"). (App. 3a). Although Diamond Shamrock subsequently made a hostile tender offer for Natomas' common stock, a stock-for-stock merger of the two companies was ultimately accomplished through friendly negotiations. *Id.* As a result of the merger, both parties became wholly-owned subsidiaries of a newly-created parent, Maxus Energy. The Natomas shareholders received 1.05 shares of Maxus Energy stock for each Natomas share and the Diamond Shamrock shareholders received 1.00 share of Maxus Energy stock for each Diamond Shamrock share. *Id.* at 4a.[1]

In 1987, the Securities and Exchange Commission ("SEC") filed a civil complaint in the United States District Court for the Southern District of New York against Martin A. Siegel, a former Kidder employee who had advised Diamond Shamrock in this transaction. The SEC complaint alleged, among other things, that Siegel had violated the federal securities laws by imparting to Ivan

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[1] Until May, 1987, respondent Maxus Energy Corporation was known as Diamond Shamrock Corporation. At the completion of the merger between Diamond Shamrock and Natomas, both became wholly-owned subsidiaries of the new Diamond Shamrock Corporation, which was later renamed Maxus Energy Corporation. Maxus Corporate Company, the other respondent, claims to be the successor in interest to both Diamond Shamrock and Maxus Energy. (App. 4a). For simplicity, both respondents will be referred to as "Maxus."

F. Boesky, also a defendant in this action, confidential non-public information concerning the proposed tender offer. Shortly after the SEC filed its action, Maxus contacted Kidder to initiate settlement discussions of claims Maxus said it would assert against Kidder arising out of the SEC complaint, and to enter into a "standstill" agreement forestalling litigation during the course of those discussions. The standstill agreement permitted either side to sue on ten days' notice.

The settlement discussions proved fruitless. On November 13, 1987, Maxus notified Kidder, pursuant to the standstill agreement, that it "may institute litigation" upon the expiration of the ten-day period with respect to the claims that had been discussed during the settlement talks, which included claims under both federal and state law.

2. On November 23, 1987, at the end of the ten-day period, Kidder filed this action in the United States District Court for the Southern District of New York asserting jurisdiction under 15 U.S.C. § 78aa, 28 U.S.C. § 1331, and the doctrine of pendent jurisdiction. Kidder's complaint sought a declaration that it was not liable to Maxus under the federal securities laws, or under state law, with respect to alleged illegal tips by Siegel to Boesky relating to the 1983 tender offer and the ensuing stock-for-stock merger. Kidder alleged that Maxus, a Delaware corporation, suffered no cognizable injury and lacked standing to sue because the claimed misconduct benefitted approximately half of Maxus' shareholder constituency—the former Natomas shareholders—at the expense of the other half—the former Diamond Shamrock shareholders. Thus, only the former Diamond Shamrock shareholders individually had standing to complain about the handling of the transaction.

Kidder filed its action in the Southern District of New York because that is the forum to which the Judicial Panel on Multidistrict Litigation had earlier that year

transferred all of the numerous shareholder actions arising out of the same Siegel-Boesky insider trading conspiracy that is at the core of the Kidder-Maxus dispute. The multidistrict proceedings, which included a class action by former Natomas shareholders, as well as numerous other cases involving alleged insider trading by Boesky, were assigned to Judge Milton Pollack under the caption *In re Ivan F. Boesky Securities Litigation.*

On the same day, Maxus brought its own suit in Texas state court. The suit seeks to recover, among other alleged damages, the "excess price" paid by the issuance of stock to Natomas shareholders at an exchange ratio supposedly inflated by Boesky's trading, and the more than $4 million in investment advisory fees paid to Kidder. The total recovery sought exceeds $1.6 billion.

3. Before the district court, Kidder maintained that under both federal securities law and Delaware law the proper party to seek recovery for the contemplated claims was not Maxus, because it sustained no injury as a result of any distortion in the stock exchange ratios negotiated on behalf of the two competing groups of shareholders. Rather, the only persons who could properly state claims for relief would be the former Diamond Shamrock shareholders who allegedly received too little of the stock in the resulting holding company. Kidder further maintained that Maxus lacked equitable standing to sue under this Court's decision in *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R. Co.*, 417 U.S. 703 (1974), and Delaware cases following it, because any corporate recovery would constitute a windfall, both to the former Natomas shareholders—who already benefitted from the alleged wrongdoing—and to persons who purchased Maxus stock subsequent to the merger and therefore sustained no injury as a result of any distortion in the merger exchange ratios.

In September 1988, Boesky moved for judgment on the pleadings, premised on Maxus' lack of standing under

Bangor Punta. Kidder joined in the motion. In November 1989, more than a year after Boesky filed his motion, Maxus suggested for the first time that the Texas court should address the issues before Judge Pollack. The Texas court declined to do so. (Court of Appeals Appendix at 733).

After receiving thousands of pages of submissions and holding seven hearings on this and related motions, Judge Pollack issued a decision on March 26, 1990 (App. 19a-24a), and a declaratory judgment incorporating his findings two weeks later. (App. 25a-27a). After noting the parties' extensive litigation of the issues before him and the fact that Maxus was continuing to press allegations in the Texas action bearing on federal securities claims, the district court concluded that "a declaration here on Kidder's claim is appropriate and is granted to lay at rest the key question raised in this case." (App. 21a). Relying on *Bangor Punta* as well as *Courtland Manor, Inc.* v. *Leeds*, 347 A.2d 144 (Del. Ch. 1975), the court held that Maxus had "suffered no cognizable injury" from the alleged insider trading and could not maintain claims challenging the stock exchange ratios in the Natomas merger. (App. 21a). The district court declined to exercise jurisdiction over the state law claims concerning the Kidder investment advisory fees, which involved distinctive legal issues that were pending before the Texas court.

When Maxus advised Kidder that it would nonetheless attempt to relitigate excess price issues in the Texas state court proceeding in apparent disregard of the declaratory judgment, Kidder moved for partial summary judgment in the Texas action, based on the collateral estoppel effect of Judge Pollack's decision and judgment. The Texas court denied Kidder's motion, without opinion, on June 20, 1990. Kidder then moved for an injunction in the district court under, *inter alia*, the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283. On July 18 and 23, 1990, Judge Pollack entered orders barring Maxus

from pursuing any claims, "whether denominated federal or state," challenging the merger exchange ratio. (App. 29a). He found that an injunction was necessary "to preclude relitigation of the issues decided" in the judgment. (App. 33a).

4. Maxus appealed both the Declaratory Judgment and the Injunction Orders, and the Second Circuit affirmed in part and reversed in part. (App. 2a). The court of appeals affirmed the issuance of the declaratory judgment to the extent that the judgment provided that Kidder was not liable to Maxus under the federal securities laws. (App. 3a). It concluded, however, that the district court had abused its discretion in also applying that same judgment to the related state-law claims. *Id.*

The court of appeals began by noting that a district court, in deciding whether to accept jurisdiction over pendent state-law claims, is required to consider and weigh the values of judicial economy, convenience, fairness, and comity. (App. 13a-14a). It acknowledged the substantial amount of time and resources that had been expended in litigating this issue, and noted that Judge Pollack was simultaneously presiding over a multidistrict action relating to the same transaction. Relying on Second Circuit precedent, however, the court of appeals held that "[t]he judicial economy factor should not be the controlling factor. . . ." (App. 14a). Instead, the court of appeals gave dispositive weight to "strong interests of federalism and comity," because the Texas proceedings were "almost at the discovery stage" and the Texas court could competently decide all the issues raised. (*Id.* at 14a-15a). Indeed, although all parties agreed that the issue of whether Maxus had standing to sue was governed by Delaware law, not Texas law, the court of appeals held that the district court was nonetheless required to defer to the Texas court on these issues.[2] Having therefore

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[2] Respondent reiterated its position that Delaware law governed, a position in which the Texas court concurred, at oral argument before

determined that the declaratory judgment was overbroad, the court of appeals remanded the case to the district court for modification of the injunction consistent with the court of appeals' opinion.

REASONS FOR GRANTING THE PETITION

This case presents an issue which has generated considerable confusion and disagreement among the courts of appeals, and which recurs with great frequency in civil litigation throughout the federal courts: the proper circumstances under which district courts may exercise their discretion to adjudicate claims of state law under the doctrine of pendent jurisdiction. In *Carnegie-Mellon University* v. *Cohill*, 484 U.S. 343, 350 (1988), this Court held that district courts are required to weigh "the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction" over state-law claims. The courts of appeals, however, have taken widely varying approaches in applying that standard, with some circuits placing principal emphasis on judicial economy, convenience, and fairness, and others placing much more substantial weight on values of comity and federalism.

As a consequence, the legal standard under which the exercise of pendent jurisdiction is determined varies greatly depending on where the underlying matter is

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the court of appeals. See Fed. R. Civ. P. 17(b) ("The capacity of a corporation to sue . . . shall be determined by the law under which it was organized"). Indeed, when Kidder first moved to stay the Texas action, the Texas court suggested that, because the threshold question of Maxus' standing was governed by Delaware law, that question could best be addressed in a third proceeding pending between Maxus and Kidder in Delaware Chancery Court. (Court of Appeals Appendix at 292). Maxus then moved for partial summary judgment in Delaware, seeking a declaration that *Bangor Punta* and its Delaware progeny do not bar Maxus' merger exchange ratio claims in the Texas action. (*Id.* at 600, 614). In December, 1988, the Delaware Chancellor dismissed the action without prejudice, on the ground that the issues before him should be resolved by either the New York or Texas courts, the only courts that might ultimately try the claims. (*Id.* at 459-70).

brought. The approach of the Second Circuit stands at one extreme in this spectrum, and the decision below illustrates the extraordinary imbalance in its treatment of this recurring issue. Indeed, under the Second Circuit's approach, the mere existence of a parallel state court proceeding appears to render any exercise of pendent jurisdiction an automatic abuse of discretion, notwithstanding any countervailing interest in judicial economy, convenience, and fairness to the parties.

In stark contrast, other courts of appeals have held that the same concerns for judicial economy, convenience and fairness to the parties which were so quickly dismissed by the Second Circuit should be the central and controlling elements in the analysis. If Kidder had filed this action in federal district court in Texas rather than in New York, for example, the exercise of pendent jurisdiction would have been upheld by the court of appeals. In light of the substantial disagreement among the circuits, and the extraordinary waste of judicial resources the Second Circuit's analysis creates in this and other large multidistrict litigation, review of the decision below is warranted.

1. Certain basic legal principles governing the exercise of pendent jurisdiction are by now well-established. First, at least since *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725-26 (1966), district courts have conducted a two-step inquiry in determining whether to exercise jurisdiction over state law claims. Initially, the court asks whether it has the constitutional *power* to hear such claims; then, if it does, it proceeds to decide whether the case is an appropriate one in which to exercise its *discretion* to do so. Second, in exercising that discretion, courts are to "consider and weigh" the four factors set forth in *Carnegie-Mellon University* v. *Cohill*, 484 U.S. 343, 350 (1988)—judicial economy, convenience, fairness and comity. Third, regardless of whether the district court decides to accept jurisdiction over the state-law claims or to decline it, that decision is subject to reversal on appeal

only for abuse of discretion. *Moor* v. *County of Alameda*, 411 U.S. 693, 716 (1973).

The core issue of how the four *Carnegie-Mellon* factors should be weighed against one another when they conflict, as they often do, has never been addressed by this Court. The result has been decisions from the courts of appeals which cannot be reconciled with one another, either in underlying theory or in their practical effect on litigation.

One line of decisions places principal emphasis upon judicial efficiency. The Fifth Circuit, for example, has described the values of judicial economy, convenience, and fairness, on the one hand, and the value of comity, on the other hand, as "oft-times divergent goals," and has concluded that "judicial economy, convenience, and fairness to litigants" are "the hallmarks of the pendent jurisdiction doctrine . . . ." *Ingram Corp.* v. *J. Ray McDermott & Co.*, 698 F.2d 1295, 1319-1320 (5th Cir. 1983).[3] The Seventh Circuit, emphasizing the same concerns, has held that

> "[j]udicial economy, the essential policy behind the modern doctrine of pendent jurisdiction which *Gibbs* created, supports the retention of pendent jurisdiction in any case where substantial judicial resources have already been committed, so that sending the case back to another court will cause a substantial duplication of effort."

Graf v. *Elgin, Joliet & E. Ry. Co.*, 790 F.2d 1341, 1347-48 (7th Cir. 1986). The Ninth Circuit follows the same approach.[4]

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[3] See also *Caserta* v. *Village of Dickinson*, 672 F.2d 431 (5th Cir. 1982); *Brown* v. *Knox*, 547 F.2d 900 (5th Cir.), *cert. denied*, 432 U.S. 906 (1977); *Perry* v. *Jones*, 506 F.2d 778 (5th Cir. 1975).

[4] See, *e.g.*, *In re Nucorp Energy Sec. Litig.*, 772 F.2d 1486, 1491 (9th Cir. 1985); *Aydin Corp.* v. *Loral Corp.*, 718 F.2d 897 (9th Cir. 1983); *Meyer* v. *California & Hawaiian Sugar Co.*, 662 F.2d 637 (9th Cir. 1981). Accord *Bank of Oklahoma, N.A.* v. *Islands Marina, Ltd.*, 918 F.2d 1476, 1480 (10th Cir. 1990).

As noted above, if Judge Pollack had been sitting in a federal district court in Texas and Kidder had filed its declaratory action there

There is a second line of decisions which adopts a very different view of the exercise of pendent jurisdiction. These decisions give far less weight to concerns about judicial economy, and establish an effective presumption that claims under state law ought to be decided by state courts. The decision below fits squarely within that tradition.

The Second Circuit acknowledged that Judge Pollack was presiding over consolidated multidistrict actions, of which this action was one, relating to the very same transaction, and noted the extensive judicial time already expended in litigating the standing/injury issue, which was common to both the federal and state-law claims. The panel also recognized that the pending state proceedings were just beginning the discovery process. Those standing/injury questions resolved by the district court after it received extensive briefing and conducted several hearings had not been presented in Texas; indeed, the Texas court at the outset of the case had indicated that the Delaware law issue should be litigated elsewhere. Significant additional effort would plainly be required before the Texas court would be in precisely the same position as the district court. Nonetheless, the court of appeals sharply discounted the relevance of those concerns by holding generally that "[t]he judicial economy factor should not be the controlling factor, and it may be appropriate for a court to relinquish jurisdiction over pendent claims even where the court has invested considerable time in their resolution." (App. 14a). It then proceeded to order the claims dismissed without prejudice, on the theory that principles of comity required the district court to defer to the state court in Texas. (App. 15a). The Second Cir-

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because that is where defendants reside, then his decision to adjudicate the state law claim would have been affirmed by the Fifth Circuit. Accordingly, Kidder has been penalized for choosing a forum that the Multidistrict Panel had concluded was the most appropriate one for handling these types of disputes. This arbitrariness in result is precisely why certiorari is necessary.

cuit's approach was similar to that taken by both the D.C. Circuit and the Third Circuit.[5]

2. The consequence of this split in authority is that the presumptions and legal analyses which govern the determination whether to accept jurisdiction over pendent claims differ substantially depending on where the underlying action is brought. As a result, the same factors that are given dispositive weight in one circuit will often be virtually ignored in another.

For example, the circuits differ radically in the weight they give to the fact that substantial amounts of time and resources may already have been invested by the parties and the court in litigating the pendent claims. In the Seventh Circuit, jurisdiction will be retained "*in any case* where substantial judicial resources have already been committed, so that sending the case to another court will cause a substantial duplication of effort." *Graf*, 790 F.2d at 1347-48 (emphasis added). Similarly, the Fifth Circuit, in reversing a district court for abusing its discretion in declining to assert jurisdiction over state law claims that had been fully litigated, held that "[p]rinciples of judicial economy, convenience, and fairness to the litigants suggest that a court should be reluctant to dismiss a pendent claim once substantial time and resources have been devoted to such claims and the court

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[5] See, *e.g.*, *Grano* v. *Barry*, 733 F.2d 164, 169 (D.C. Cir. 1984) (reversing assertion of pendent jurisdiction as abuse of discretion because "[i]n general, 'principles of comity and the desirability of a "surer-footed reading of applicable law" support the determination of state claims in state court.'" (quoting *Financial Gen. Bankshares, Inc.* v. *Metzger*, 680 F.2d 768, 769 (D.C. Cir. 1982) (quoting *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966)))); *Shaffer* v. *Board of School Directors*, 730 F.2d 910, 912 (3d Cir. 1984) (reversing assertion of pendent jurisdiction as abuse of discretion because "a strong policy exists in favor of resolving state law issues in state courts").

has heard the evidence and arguments on such issues." *Caserta*, 672 F.2d at 433.[6]

In the instant case, the parties and the court have already made extensive investments in litigating the pendent claims. The court of appeals itself recounted that "[n]early three years of the litigants' time and resources and substantial judicial efforts have been devoted to the litigation" and that "Judge Pollack received thousands of pages of written submissions and held seven hearings in connection with the various motions of the parties." (App. 8a, 9a).[7] Nonetheless, the court of appeals concluded that it was "appropriate" for the district court to "relinquish jurisdiction over pendent claims even where the court has invested considerable time in their

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[6] See also *Jackson* v. *Stinchcomb*, 635 F.2d 462, 472 n.20 (5th Cir. 1981) (interests of judicial economy "clearly militate against dismissal of the state law claim in this case where the district court judge has already devoted a great amount of time and resources to consideration of that issue at not just one but at three hearings"); *Aydin Corp.* v. *Loral Corp.*, 718 F.2d 897, 904 (9th Cir. 1983) (pendent jurisdiction appropriate "because the record shows that the court and the litigants had expended considerable time on the pendent claims"); *Meyer* v. *California & Hawaiian Sugar Co.*, 662 F.2d 637, 640 (9th Cir. 1981) (pendent jurisdiction appropriate "[w]here, as here, the court and the litigants had expended considerable time on the pendent claims"); *Transcontinental Leasing, Inc.* v. *Michigan Nat'l Bank of Detroit*, 738 F.2d 163, 166 (6th Cir. 1984) (pendent jurisdiction appropriate because parties had "expended substantial time and energy").

[7] As Judge Pollack himself observed, he had become convinced "that after all the litigation [that] has gone on in this Boesky business in which I have been conducting as a multidistrict judge, that it was high time, [given] the extended submission[s] which I referred to in a footnote of my previous decision, to get a resolution of the issue that I think is at the heart of the present application . . . [and] that that should not be abandoned after all the work that all of us . . . had done on this case for nearly a year to try to get it on the road to clarity." (Court of Appeals Appendix at 554).

resolution," and that the failure to do so here was not only wrong, but an abuse of discretion. (*Id.* at 14a).[8]

In a related division of authority, at least two circuits have held that, where a key issue has already been decided in disposing of the federal claims, "no purpose would [be] served by relinquishing jurisdiction to the state courts." *Mechmet* v. *Four Seasons Hotels*, 825 F.2d 1173, 1178 (7th Cir. 1987). Accord *Bright* v. *Bechtel Petroleum, Inc.*, 780 F.2d 766, 771 (9th Cir. 1986).[9] That was precisely the situation with which the Second Circuit was presented in this case, because the standing/injury issue resolved by the district court was common to—and dispositive of—both the federal and state law claims. Because the resolution of that issue was a necessary part of disposing of the federal securities claims, there was no colorable basis—if concerns about judicial economy, fairness, and convenience to the litigants are to play *any* role in the analysis—for the court of appeals to limit the applicability of the district court's judgment to the federal action, and thus to require the issue to be litigated a second time in another forum. The decision of the court of appeals to divide the holding in that way

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[8] The Third Circuit has reached a similar conclusion. See *Shaffer*, 730 F.2d at 912; *Weaver* v. *Marine Bank*, 683 F.2d 744, 746 (3d Cir. 1982); *Tully* v. *Mott Supermarkets*, 540 F.2d 187, 196 (3d Cir. 1976). Chief Judge Sloviter has indicated her disagreement with this holding. See *Weaver*, *supra* at 750 (separate opinion of Sloviter, J.) (*Tully*'s "rejection of litigation time as a relevant factor appears inconsistent with *Gibbs*.")

[9] Consistent with these views, the Fourth Circuit has held that "judicial economy also counsels in favor of" deciding a pendent state law claim on the merits—even where the state law and federal law issues are distinct—if, in examining the federal law issue, the district court finds there is no viable state law cause of action. In these circumstances, the district court "should have at least the discretion" to exercise pendent jurisdiction and dismiss the state law claim on the merits. *Washington* v. *Union Carbide Corp.*, 870 F.2d 957, 962 (4th Cir. 1989).

reflected its view that the concerns of economy, fairness, and convenience were completely secondary.

3. The court's decision to deprecate the values of judicial economy, fairness, and convenience to the parties was matched by a corresponding elevation of a novel and unprecedented understanding of comity as the principal (and perhaps the only) concern in its analysis. This Court has held that, "given advantages of economy and convenience and no unfairness to litigants, *Gibbs contemplates* adjudication of [pendent state law] claims." *Hagans* v. *Lavine*, 415 U.S. 528, 546 (1974) (emphasis added).[10] Nonetheless, under the analysis set forth by the Second Circuit, the mere pendency of a state court proceeding appears, by itself, to mandate that jurisdiction be declined—an approach that directly conflicts with *Gibbs* and *Hagans*.

Indeed, the court of appeals identified only two pertinent aspects of the Texas proceeding in explaining why the exercise of pendent jurisdiction by Judge Pollack was erroneous. First, the Texas court proceedings were "almost at the discovery stage." (App. 14a). Second, the standing/injury issue was one which "the Texas court could capably and competently decide." (*Id.* at 15a).[11]

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[10] See also C. Wright, A. Miller & E. Cooper, 13B *Federal Practice and Procedure* § 3567.1, p. 144 (1984) ("Although there are cases in which courts have used their discretion to refuse to hear a pendent claim, these are exceptional, and ordinarily the power is exercised if it is found to exist").

[11] The court of appeals also suggested that the state law claims were not "*so* inextricably intertwined" with federal policy as to make the argument for pendent jurisdiction "*particularly* strong." (App. 15a) (emphasis added). This is perplexing. This action, the parallel proceeding in Texas state court, and numerous other claims in the multidistrict proceeding directly derive from the SEC's complaint against Siegel and clearly implicated "the federal policy in favor of protecting the integrity of the securities market. . . ." *Barkman* v. *Wabash, Inc.*, No. 85 C 611 (N.D. Ill. June 24, 1987) (1987 Westlaw 12932, at 3).

Whether taken separately or in combination, those facts are a wholly insufficient basis for a finding that the district court erred. The fact that the Texas case was "almost at the discovery stage" indicated not that it was far advanced, but just the opposite—that the parties had by then invested little in the prosecution of that litigation.[12] Furthermore, while the Texas court undoubtedly is competent to decide questions of law, that will always be true with any parallel action. What the court of appeals' analysis therefore suggests is not that the district court must weigh concerns of comity against countervailing concerns of judicial economy, fairness, and convenience to the parties, but rather that the mere existence of a parallel state proceeding is sufficient to render any exercise of pendent jurisdiction an abuse of discretion.

The extent to which the Second Circuit improperly expanded the role of comity in its analysis is demonstrated by the fact that, as respondents agreed throughout, the corporate injury and standing issues presented were issues of *Delaware* law, not Texas law. As this Court explained in *Gibbs*, 383 U.S. at 726, the principle of comity is designed to ensure, in appropriate cases, that the litigants secure a "surer-footed reading of applicable law." A Texas state court, however, is no more competent to decide a question of Delaware law than is a federal court in New York, and the extension of the comity analysis to state court actions applying the laws of a different state is both entirely unwarranted and contrary to the reasoning of numerous other courts of appeals. See, *e.g.*, *Lentino* v. *Fringe Employee Plans*, 611 F.2d 474, 480 (3d Cir. 1979) (comity involves "the state interest in

[12] The only motions presented to the Texas court had been Kidder's motions to stay the action in favor of the federal multidistrict proceeding, and Maxus had not even noticed a single deposition for more than two years after the Texas complaint had been filed. The Texas court had never addressed the corporate injury/standing issue, or, for that matter, any other issue relating to the merits of the action.

adjudicating its *own* claims") (emphasis added); *Graf* v. *Elgin, Joliet and E. Ry. Co.*, 790 F.2d 1341, 1346 (7th Cir. 1986) (interest in comity is that "a state's *own* courts should be allowed to decide issues of state law") (emphasis added). See also *Hagans*, 415 U.S. at 548 (discussing "desirability of having a reliable and final determination of the state claim by state courts *having more familiarity* with the controlling principles") (emphasis added). The undue emphasis placed by the court of appeals on concerns for "comity" as grounds for reversing the exercise of pendent jurisdiction by a district court were thus compounded by its unusually far-reaching definition of the circumstances which would be deemed to raise such concerns in the first place.[13]

4. This is not simply, or principally, a catalogue of isolated errors. The problematic elements of the Second Circuit's analysis—the casual dismissal not only of the extensive time and resources already invested in litigating the pertinent issue, but also of the complete overlap between the federal and state law issues which the district judge sought to decide, all in order to enable a Texas court presiding over an embryonic lawsuit to relitigate an issue of Delaware law—stem from a single analytical flaw. The court of appeals so discounted considerations of judicial economy, convenience, and fairness to litigants, that it ensured that any case which implicates even the slightest interest of federal-state comity will not be available for pendent claims.

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[13] The court's extreme concern for comity seems particularly misplaced in the context of huge multidistrict litigation, such as was involved in this case. It is difficult to imagine a situation in which a federal court will be less inclined to reach out to decide matters pending before the state court unless the interests of justice demand that result. Judge Pollack's handling of the investment fee issue demonstrates this point vividly. The proceedings before him did not significantly advance that part of the case toward final resolution and therefore he properly declined to exercise jurisdiction over that claim rather than complicate an already overburdened multidistrict docket.

To be sure, with respect to most multi-factor balancing tests, differences in outcomes will generally be attributable to factual differences in the cases and will not present issues warranting this Court's review. In this instance, however, the courts of appeals have taken two very different paths. The extent of the divergence is underscored by the fact that in many of these conflicting decisions—including the decision below—the appellate court was expressing its holding not simply by approving an exercise of discretion as permissible, but rather by reversing a district court's decision to accept or decline pendent jurisdiction as an *abuse* of discretion. The differences in these cases thus are not limited to facts, but more fundamentally involve conflicting legal approaches used to evaluate the facts.[14]

The court of appeals' willingness to sacrifice judicial economy and fairness to the litigants is particularly disturbing in light of the general recognition that plaintiffs in many areas of mass tort litigation are being deprived of any recovery because defendants in mass tort cases are

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[14] This Court has frequently granted certiorari to review erroneous applications of the abuse of discretion standard and reversed decisions of courts of appeals that have failed to accord proper deference to a district court's discretionary balancing of factors, even where some significant factor weighed against the district court's determination. See, *e.g.*, *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 10-12 (1980) (district court's exercise of its discretion under Fed. R. Civ. P. 54(b) was not "clearly unreasonable" and should not have been disturbed); *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976) ("The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action . . . ."); *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 257-61 (1981) (dismissal reinstated because the district court had "not act[ed] unreasonably" in considering the various factors to be weighed).

expending all of their resources on litigation costs.[15] Thus, in cases such as this one, the party being required to defend claims in state court previously litigated in federal court simply reduces wastefully the amount of money available to other plaintiffs who have meritorious claims.

This issue is a recurring and important one, and raises significant questions relating to the district courts' authority to manage multidistrict and other complex litigation. Congress has recognized and encouraged the consolidation of claims for the purpose of efficiently managing federal civil litigation.[16] The courts too have recognized, as Judge Pollack did in this case, the value of having all related issues resolved in a single proceeding if at all possible.[17] The general split in authority among the circuits, and the specific approach adopted by the Second Circuit, threaten the orderly and consistent disposition of the many federal cases in which parties seek to assert both federal and state-law claims. A grant of certiorari is thus essential to determine whether the benefits of judicial economy that undergird both the concept of multidistrict consolidation of litigation and pendent jurisdiction will be sacrificed to promote comity to state courts.

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[15] In its recent report, the Judicial Conference Ad Hoc Committee on Asbestos Litigation described as among the "most objectionable aspects of asbestos litigation" that "the same issues are litigated over and over" and "transaction costs exceed the victims' recovery by nearly two to one." Report of the Judicial Conference Ad Hoc Comm. on Asbestos Litig. at 3 (March 1991).

[16] See 28 U.S.C. § 1407. See also *In re New York City Mun. Secs. Litig.*, 572 F.2d 49, 51 (2d Cir. 1978) ("the essential purpose of Congress in enacting [the multidistrict statute] was to permit the centralization in one district of all pretrial proceedings '[w]hen civil actions involving one or more common questions of facts are pending in different districts' . . . . 'to assure the "just and efficient conduct" of such actions.'") (quoting H.R. Rep. No. 1130, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S. Code Cong. & Admin. News 1898, 1899-1900).

[17] See, *e.g.*, *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332, 1336 (5th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 30, 1991

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 324, 524—August Term, 1990

(Argued October 1, 1990 Decided Feb. 6, 1990)

Docket Nos. 90-7487, -7657

KIDDER, PEABODY & COMPANY, INCORPORATED,
Plaintiff-Appellee,

v.

MAXUS ENERGY CORPORATION and
MAXUS CORPORATE COMPANY,
Defendants-Appellants,

MARTIN A. SIEGEL, IVAN F. BOESKY and JOHN DOES 1-10,
Defendants.

Before: CARDAMONE and MINER, *Circuit Judges*, and MUKASEY, *District Judge*.*

Consolidated appeals from declaratory judgment and injunction order entered in United States District Court for the Southern District of New York (Pollack, *J.*); the judgment declared appellants not liable under sections 10(b) and 14(e) of the Securities Exchange Act of 1934 for damages arising out of a merger, declared exchange ratios relating to distribution of stock of new holding company not subject to retroactive adjustment, and declined jurisdiction over pendent state law claims; the injunction order, issued after the judgment, enjoined pur-

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* Of the United States District Court for the Southern District of New York, sitting by designation.

suit of any claim in state court arising from the merger exchange formula.

Affirmed in part and reversed in part.

CHESTER J. HINSHAW, Dallas, Texas (Frederick E. Sherman, New York, New York, Jones, Day, Reavis & Pogue, Dallas, Texas and New York, New York, of counsel) *for Defendants-Appellants Maxus Energy Corp. and Maxus Corporate Co.*

GARY P. NAFTALIS, New York, New York (Ellen R. Nadler, Mark J. Headley, Kramer, Levin, Nessen, Kamin & Frankel, New York, New York, of counsel), for *Plaintiff-Appellee Kidder, Peabody & Company, Inc.*

CHARLES E. DAVIDOW, New York, New York, *for Defendant-Appellee Ivan F. Boesky.*

Miner, *Circuit Judge*:

Defendants-appellants, Maxus Energy Corporation ("Maxus Energy") and Maxus Corporate Company ("Maxus Corporate"), appeal from a judgment entered in the United States District Court for the Southern District of New York (Pollack, *J.*), declaring that Maxus Energy and Maxus Corporate may not assert claims under sections 10(b) and 14(e) of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78j(b), 78n(e) (1988), and that the exchange ratios of a stock for stock distribution between the two merging corporations are not subject to retroactive adjustment and, in any event, may not be challenged by Maxus Energy or Maxus Corporate because they suffered no cognizable injury. Appellants also appeal from an order enjoining them from asserting claims in a pending Texas court proceeding commenced on the same day that the declaratory judgment action was instituted. Appellants contend that the federal claims were mooted by their numerous representations to the court that they would not assert claims under the 1934 Act and that the pendent state law claims should

have been dismissed after the 1934 Act claims were mooted. Finally, appellants assert that it was improper for the court to enjoin the state court proceedings. We hold that the judgment declaring that Maxus Energy and Maxus Corporate may not assert claims under the 1934 Act was proper but that the district court erred in exercising pendent jurisdiction over state law claims after declining to do so. We also hold that the injunction exceeded the scope of the declaratory judgment.

BACKGROUND

Early in 1983, Diamond Shamrock Corporation ("Diamond Shamrock") retained Kidder, Peabody & Company, Inc. ("Kidder") to provide financial advice regarding a possible acquisition of Natomas Company ("Natomas"). Martin A. Siegel, a vice president and director of Kidder, headed Kidder's team of investment advisers. Acting on Kidder's advice, in May of 1983 Diamond Shamrock began a hostile tender offer for 51% of Natomas' outstanding common stock at $23.00 per share. At that time, the market price of Natomas stock was $18.88 per share.

Friendly merger negotiations ensued, and Diamond Shamrock and Natomas agreed to a stock for stock merger, whereby both companies became wholly owned subsidiaries of a newly created parent, Maxus Energy.[1] The $18.88 price per share served as the basis for the week-long friendly merger negotiations. On August 31, 1983, at the completion of the transaction, Diamond Shamrock's former shareholders owned 54% of Maxus Energy stock and Natomas' former shareholders owned the remaining 46%. The Natomas shareholders

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[1] Prior to May 1987, Maxus Energy was known as Diamond Shamrock Corporation. The merger occurred between "old" Diamond Shamrock Corporation and Natomas and, at the completion of the merger, both became wholly-owned subsidiaries of "new" Diamond Shamrock Corporation, which was subsequently renamed Maxus Energy Corporation.

received 1.05 shares of Maxus Energy stock for each Natomas share and the "old" Diamond Shamrock shareholders received 1.00 shares of Maxus Energy stock for each "old" Diamond Shamrock Corporation share.

On February 13, 1987, the Securities and Exchange Commission ("SEC") filed a complaint against Siegel, alleging that, while advising Diamond Shamrock to acquire Natomas, he had illegally disclosed material nonpublic information about the proposed Natomas acquisition to Ivan F. Boesky. The complaint noted that, in February of 1983, Boesky had purchased Natomas stock on the basis of that information, earning about $4.8 million upon the sale of the stock after the merger. When Maxus Energy learned of these activities, it contacted Kidder to enter into settlement discussions pertaining to potential legal claims arising from the wrongdoing of Siegel and Boesky. The parties also entered into a "standstill" agreement; according to its terms, either party had to notify the other ten days prior to commencement of a lawsuit relating to the matters in dispute. After settlement discussions proved fruitless, Maxus Energy notified Kidder on November 13, 1987 that it intended to commence a lawsuit after the expiration of the ten day period.

At 7:03 a.m. on November 23, 1987, Maxus Corporate, claiming to be successor in interest to both Diamond Shamrock and Maxus Energy, brought a suit in Texas state court against Kidder, Siegel and Boesky, alleging state law claims of breach of contract and negligence against Kidder, and breach of fiduciary duty, fraud, conversion and violation of section 27.01 of the Texas Business and Commerce Code against all defendants. Maxus Corporate sought actual and consequential damages for (1) the more than $4 million in fees and expenses paid to Kidder under financial adviser and dealer manager agreements; (2) the more than $56 million in out-of-pocket costs incurred in the Natomas acquisition; (3) the losses it incurred in having been fraudulently induced

to acquire Natomas; (4) the inflated amount it was required to pay to acquire Natomas because of the illegal conduct of Kidder, Siegel and Boesky; and (5) punitive damages.

At approximately 9:00 a.m. that same day, Kidder initiated a declaratory judgment action in the Southern District of New York against Maxus Energy, Siegel and Boesky. It sought a declaratory that it was not liable to Maxus Energy under sections 10(b) and 14(e) of the 1934 Act and a declaration of non-liability for state law claims of breach of contract, breach of fiduciary duty, negligence and fraud. Kidder also sought a declaration that if it were found liable to Maxus Energy, it was entitled to indemnification or contribution from Siegel and Boesky. Jurisdiction was asserted under section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1988) and 28 U.S.C. § 1331 (1988). No diversity jurisdiction was alleged because both Kidder and Maxus Energy are Delaware Corporations.

Also on that day, Kidder filed, in the Delaware Court of Chancery, a second declaratory judgment action against Maxus Energy seeking a declaration under the holding in *Bangor Punta Operations, Inc. v. Bangor & Aroostock R.R.*, 417 U.S. 703 (1974) (shareholder who bargains for and purchases substantially all the shares of a corporation lacks equitable standing to assert claim for damages resulting from prior corporate misconduct) that Maxus Energy lacked standing to sue for damages for the inflated exchange ratio. The Delaware court ultimately dismissed the action without prejudice because of the pending declaratory judgment action before Judge Pollack and the pending Texas action.

On February 10, 1988, Maxus Energy moved to dismiss the declaratory judgment action before Judge Pollack on the grounds of lack of subject matter jurisdiction, improper service of process, and inappropriate use of the federal Declaratory Judgment Act, 28 U.S.C.

§ 2201 (1988). During the proceedings on its motion to dismiss, Maxus Energy represented on several occasions to the court that neither it nor Maxus Corporate ever would assert any claims under sections 10(b) or 14(e) of the Act against Kidder regarding the Natomas transaction. Notwithstanding these representations, Judge Pollack denied Maxus Energy's motion to dismiss, without prejudice to renewal of the motion at the completion of pre-trial proceedings.

Soon after, Boesky moved for judgment on the pleadings, asserting that Maxus Energy was not injured by his purchases of Natomas stock and that, in any event, Maxus Energy was barred from recovering under the *Bangor Punta* holding. On December 15, 1989, Maxus Energy renewed its motion to dismiss, once again renouncing any intent to pursue federal securities claims against Kidder on behalf of itself or its wholly-owned subsidiary, Maxus Corporate. On January 26, 1990, Kidder moved for summary judgment declaring that neither Maxus Energy nor Maxus Corporate could state claims for relief against Kidder arising from the merger. Shortly thereafter, Kidder amended its complaint to add Maxus Corporate as a defendant.

In response to Kidder's amended complaint, Maxus Energy moved to dismiss Kidder's section 10(b) and section 14(e) claims as moot on the basis of the numerous representations it had made to the court renouncing any intent to assert these claims. Maxus Corporate moved to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction and on the ground that the claims were barred by, *inter alia*, the federal Anti-Injunction Act, 28 U.S.C. § 2283 (1988).

On March 26, 1990, Judge Pollack issued an order, which was followed on April 13, 1990 by the entry of a judgment, denying the motions of Maxus Energy and Maxus Corporate to dismiss and declaring that Kidder was not liable to either Maxus Energy or Maxus Cor-

porate under sections 10(b) and 14(e) of the 1934 Act. Judge Pollack found that the court had jurisdiction over Maxus Corporate because it was the "alter ego" of Maxus Energy and had waived service of process by participating in the case. In the fifth paragraph of the judgment, Judge Pollack stated that "[t]he exchange ratios of the negotiated, stock for stock, distribution of the equity stock of the new holding company to the stockholders of Natomas . . . and (Old) Diamond Shamrock . . . are not subject to retroactive adjustment on claims by Diamond Shamrock . . .," and Maxus Energy and Maxus Corporate "suffered no cognizable injury" as a result of these transactions. In the seventh paragraph, Judge Pollack concluded that "[t]he balance of [Kidder's] claims to declaratory relief, essentially based on its fee controversy with Diamond Shamrock, are pendent state claims over which this Court declines to exercise jurisdiction." Kidder's claims for contribution and indemnification against Boesky and Siegel were dismissed. Maxus Energy and Maxus Corporate appeal from the judgment entered against them by filing notices of appeal on May 17, 1990 and May 29, 1990, respectively.

About two weeks after the entry of the declaratory judgment, Kidder moved for summary judgment in the Texas state court on the ground that Maxus Corporate's state law claims were barred by the doctrine of res judicata. This motion focused on the fifth paragraph of the declaratory judgment. The Texas court denied the motion on June 20, 1990. Several days later, Kidder approached Judge Pollack, requesting permission to file a motion to enforce the declaratory judgment. Judge Pollack signed an order to show cause and scheduled a hearing to determine whether the Texas court proceedings should be enjoined. Finally, on July 23, 1990, Judge Pollack signed an order enjoining Maxus Energy and Maxus Corporate from pursuing in the Texas state court any claim, however denominated, "arising from the

merger exchange formula, as well as what led up to it, in the stock-for-stock merger."

DISCUSSION

Disqualification

Maxus Energy and Maxus Corporate [2] moved in this court on August 28, 1990 to vacate the declaratory judgment and the injunction order on the ground that Judge Pollack and his wife owned shares of General Electric ("GE") stock, which holds 80% of the outstanding stock of Kidder through one of its wholly owned subsidiaries. Appellants contend that Judge Pollack therefore was disqualified from presiding over the case under 28 U.S.C. § 455 (1988) before entering any of the rulings. On August 18, 1990, Judge Pollack informed this court that, immediately upon learning of the relationship between GE and Kidder, he and his wife had sold their shares on August 9, 1990.

Maxus argues that Judge Pollack knew of the relationship between GE and Kidder because in two affidavits and at one hearing references were made to GE's indirect ownership of Kidder. Pointing to 28 U.S.C. § 455(b)(4), which requires disqualification where the judge knows of his financial interest in a party, Maxus contends that vacatur is mandated. During the course of the proceedings in this case, Judge Pollack received thousands of pages of written submissions and held seven hearings in connection with the various motions of the parties. We think it unlikely that Judge Pollack knew of his interest simply because one or two passing references were made about GE. His complete divestiture and disclosure upon learning of the interest belie the contention that he knew

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[2] Maxus Corporate and Maxus Energy hereafter will be referred to as "Maxus." A distinction between Maxus Corporate and Maxus Energy will be made only where necessary.

of the interest but continued to preside over the litigation nontheless.

28 U.S.C. § 455(f) provides in relevant part that:

> Notwithstanding the preceding provisions of this section, if any . . . judge, . . . to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him . . ., that he . . . has a financial interest in a party . . ., disqualification is not required if the . . . judge . . . divests himself . . . of the interest that provides the grounds for the disqualification.

We think that section 455(f) directly applies to this situation. Nearly three years of the litigants' time and resources and substantial judicial efforts have been devoted to the litigation. Judge Pollack's fortright divestiture of this stock eliminated the need for disqualification, since the requirements of section 455(f) were fulfilled. The entire problem would have been avoided had the parties filed their corporate disclosure statements with the district court at the commencement of the action as required by rule 9 of the Rules of the United States District Court for the Southern District of New York. We fail to understand why the parties neglected to follow the district court rules, and give fair warning that such neglect will not be countenanced in the future.

Declaratory Judgment

Maxus Corporate contends that the district court lacked in personam jurisdiction over it and lacked subject matter jurisdiction over any of the claims that Kidder asserted against it in its amended complaint. Judge Pollack found that Maxus Corporate treated itself, and had been treated, as the "alter ego" of Maxus Energy throughout the litigation. Because Maxus Corporate, as Maxus Energy's alter ego, sufficiently participated in the proceedings, he held

that it waived any objection to a lack of personal service of process.

Jurisdiction is predicated on section 27 of the 1934 Act, which provides for nationwide service of process. 15 U.S.C. § 78aa (1988); *see Mariash v. Morrill*, 496 F.2d 1138, 1142 (2d Cir. 1974); *Steinberg & Lyman v. Takacs*, 690 F. Supp. 263, 265-66 (S.D.N.Y. 1988). Section 27 confers personal jurisdiction over a defendant who is served anywhere within the United States. *Takacs*, 690 F. Supp. at 265. We agree with the district court that Maxus Corporate waived service of process. *See* 4 C. Wright & A. Miller, Federal Practice & Procedure § 1063, at 226 (2d ed. 1987). Throughout the proceedings, Maxus Energy acted on behalf of itself and Maxus Corporate. In fact, Maxus Energy even submitted papers to the court in the name of itself and Maxus Corporate. As the district court correctly found, the evidence reveals that Maxus Corporate, as the alter-ego of Maxus Energy, participated fully in the proceedings and therefore waived any objections to lack of service of process. Maxus Corporate also contends that the district court lacked subject matter jurisdiction over the claim asserted against it because, at the time Kidder amended its complaint, no live controversy existed. As we discuss below, a live controversy existed at all times, including the time when Kidder amended its complaint to include Maxus Corporate as a defendant, and therefore, Maxus Corporate's contention is without merit.

Kidder sought a declaration that it is not liable to Maxus for violations of sections 10(b) and 14(e) of the 1934 Act. Apparently, after learning of the SEC investigation into the activities of Siegel relating to the Diamond Shamrock/Natomas merger, Maxus contacted Kidder to enter into settlement discussions about potential claims arising out of this transaction. Maxus representatives sent a memorandum to Kidder detailing the claims it might assert: one claim was based on the federal securi-

ties laws. A declaratory judgment action under 28 U.S.C. § 2201 (1988) therefore was properly commenced in light of the real threat of litigation.

"[T]he question in each case [in which a declaratory judgment is sought] is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (citation omitted); *Christopher P. v. Marcus*, 915 F.2d 794, 802 (2d Cir. 1990); *Beacon Constr. Co. v. Matco Elec. Co.*, 521 F.2d 392, 397 (2d Cir. 1975); *Salomon Bros. v. Carey*, 556 F. Supp. 499, 501 (S.D.N.Y. 1983). Whether a real and immediate controversy exists in a particular case is a matter of degree and must be determined on a case-by-case basis. *Salomon Bros.*, 556 F. Supp. at 501 (citing *Muller v. Olin Mathieson Chem. Corp.*, 404 F.2d 501, 504 (2d Cir. 1968)); 10A C. Wright & A. Miller, Federal Practice & Procedure § 2757, at 580 (2d ed. 1983). In reviewing the trial court's exercise of discretion to grant or refuse declaratory relief, we may reverse where we find that the exercise was erroneous. *See Broadview Chem. Corp. v. Loctite Corp.*, 417 F.2d 998, 1000 (2d Cir. 1969), *cert. denied*, 397 U.S. 1064 (1970).

"[A] declaratory judgment action should be entertained when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and . . . when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Fort Howard Paper Co. v. William D. Witter, Inc.*, 787 F.2d 784, 790 (2d Cir. 1986) (citations omitted). " 'It follows as a general corollary to this rule that if either of these objectives can be achieved the action should be entertained . . . .' " *Salomon Bros.*, 556 F. Supp. at 502 (quoting *Broadview Chem. Corp.*, 417 F.2d at 1001).

Maxus contends, however, that Kidder's claims under sections 10(b) and 14(e) of the 1934 Act died and the parties lost a legally cognizable interest in their resolution when Maxus Energy for itself and Maxus Corporate committed never to assert these claims against Kidder. A controversy ceases to be "real and immediate" when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Where the defendant voluntarily ceases the conduct at issue, however, the declaratory action is not necessarily mooted. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Here, Maxus asserted that it would not bring an action grounded in the federal securities laws against Kidder. This is not a case where the parties have entered into a settlement, *Nestle Co. v. Chester's Market, Inc.*, 756 F.2d 280, 283 (2d Cir. 1985); *International Union v. Dana Corp.*, 697 F.2d 718, 721 (6th Cir. 1983), or where the defendant has "entered into a binding, judicially enforceable agreement," *Stokes v. Village of Wurstboro*, 818 F.2d 4, 5 (2d Cir. 1987). In those situations, the claims inarguably were moot. By contrast, Maxus attempts to unilaterally bar Kidder's claims for declaratory relief simply by representing that it will not bring an action under the federal securities laws.

Without a declaratory judgment, Maxus again could put Kidder to the task of defending against the federal securities claims. *See Brooks v. Flagg Bros., Inc.*, 63 F.R.D. 409, 413 (S.D.N.Y 1974) (finding that, though defendant promised not to sell plaintiff's furniture, threat that furniture might be sold in the future made plaintiff's claim a case or controversy for purposes of declaratory relief). A judicial declaration that Maxus is barred from asserting the 1934 Act claims would both settle the matter between these parties once and for all and dispel all uncertainty regarding the liability of Kidder for these claims. Under these circumstances, Maxus cannot complain that the district court declared the rights of the

parties in accordance with the very representations it made.

Maxus next contends that the district court abused its discretion by determining an issue that impacts directly on the claims pending in the Texas state court proceedings. The parties appear to be somewhat uncertain as to whether and to what extent the declaratory judgment declared the rights of Kidder and Maxus relating to state law claims. In paragraph five of the declaratory judgment, the court held that the merger exchange ratio could not be the subject of retroactive adjustment and that Maxus had suffered no "cognizable injury" in any event. In paragraph seven it declined to exercise jurisdiction over "the balance of" Kidder's claims for declaratory relief, which it characterized as "pendent state claims" that were "essentially based on its fee controversy with Diamond Shamrock." We think that paragraph five of the judgment disposes of issues pertaining to state law claims, notwithstanding the subsequent declaration of the court in the seventh paragraph. The state law issues it disposes of are those referrable to damages, the district court having held that Maxus suffered no injury as a result of the exchange of stock. However, we find that once the 1934 Act claims were resolved in Kidder's favor, it was unnecessary to declare that Maxus Corporate could not seek damages on any claim that it might assert in the Texas action under Texas law.

A federal court may exercise pendent jurisdiction over state-law claims "whenever the federal-law claims and state-law claims in the case 'derive from a common nucleus of operative fact' and are 'such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding.'" *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349 (1988) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)). The decision whether to exercise pendent jurisdiction is within the discretion of the district court. *Falls Riverway Realty, Inc. v. City of*

Niagara Falls, 732 F.2d 38, 42 (2d Cir. 1984). In exercising that discretion, a district court is required to "consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction." *Carnegie-Mellon*, 484 U.S. at 350; *Raucci v. Town of Rotterdam*, 902 F.2d 1050, 1055 (2d Cir. 1990).

Kidder contends that the amount of time expended and the fact that Judge Pollack is presiding over consolidated multidistrict actions brought by individual shareholders relating to the same transaction point to the exercise of pendent jurisdiction. We think, however, that the balance of factors weighed in favor of divestiture of the pendent state law declaratory claims. The judicial economy factor should not be the controlling factor, and it may be appropriate for a court to relinquish jurisdiction over pendent claims even where the court has invested considerable time in their resolution. *Powell v. Gardner*, 891 F.2d 1039, 1047 (2d Cir. 1989) (even after a trial on the merits of section 1983 claim, the district court properly dismissed pendent state law claims after directing a verdict in favor of defendant on section 1983 claim). *Cf. Dunton v. County of Suffolk*, 729 F.2d 903, 910 (2d Cir. 1984) ("Even if the federal claims are discovered to be patently meritless only after the trial begins, once that discovery is made the state claims must be dismissed along with the federal ones.").

The strong interests of federalism and comity in this case pointed toward divestiture of pendent jurisdiction. The record reveals that the Texas court proceedings were moving along and were almost at the discovery stage. Several pre-trial motions had been made and disposed of by that court. Moreover, the issue of damages arising from the transaction, which the district court found to be governed by the *Bangor Punta* rule barring award of damages for prior corporate misconduct to purchaser of

corporate shares, was directly before the Texas court. In its original petition, Maxus Corporate asked for damages in the amount of $300 million arising from the inflated market price of Natomas stock as a direct consequence of the insider trading of a Kidder employee. Whether or not *Bangor Punta* applies to the Diamond Shamrock/ Natomas merger was a question that the Texas court could capably and competently decide. A district court should refrain from "reach[ing] out for . . . issues, thereby depriving state courts of opportunities to develop and apply state law . . . ." *Mayer v. Oil Field Sys.*, 803 F.2d 749, 757 (2d Cir. 1986). Since Maxus Corporate sought to have the damages issues determined in the Texas court on its claims for breach of contract, breach of fiduciary duty, negligence, fraud and conversion and for violations of the Texas Business and Commerce Code in the Texas complaint, its choice of forum should have been honored.

Finally, the state law issue of damages arising from the transaction was not so inextricably intertwined with " 'federal policy that the argument for exercise of pendent jurisdiction is particularly strong.' " *Rosado v. Wyman*, 397 U.S. 397, 404 (1970) (footnote omitted) (quoting *United Mine Workers*, 383 U.S. at 727)); *see Baylis v. Marriott Corp.*, 843 F.2d 658, 665 (2d Cir. 1988) ("One factor that may sometimes favor retaining pendent jurisdiction is when a state claim is closely tied to questions of federal policy and where the federal doctrine of preemption may be implicated.")

Although it was proper for the court under the circumstances to settle the federal securities claims once and for all, it was error to dispose of the state law issues relating to Maxus Corporate's damages arising from the alleged tipping by Siegel, the subsequent elevation of the price in Natomas stock, and the inflated exchange ratio occasioned by the allegedly unlawful activities. *Carnegie-Mellon*, 484 U.S. at 350.

Maxus contends that once it filed its notice of appeal to this court, the district court was divested of jurisdiction to issue an injunction. As a general rule, once a notice of appeal has been filed, "it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam). We have noted an exception to that general rule in *International Ass'n of Machinists & Aerospace Workers v. Eastern Air Lines*, 847 F.2d 1014 (2d Cir. 1988). There, the court held that under Fed R. Civ. P. 62(c), a district court may grant injunctive relief after a proper notice of appeal has been filed, but only when it is necessary to preserve the status quo pending the appeal. *Id.* at 1018.

Here, Judge Pollack issued the injunction because he was advised that Maxus Corporate continued to litigate the issue of damage in the claims it asserted in the Texas court proceedings, despite the provisions of the declaratory judgment. The injunction expressly provided that it was issued to preserve the status quo as a result of Maxus Corporate's litigation posture in Texas. We find that Judge Pollack had the jurisdiction to issue an injunction to preserve the status quo. *See New York State Nat'l Org. of Women v. Terry*, 886 F.2d 1339, 1350 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990); *Leonhard v. United States*, 633 F.2d 599, 609-10 (2d Cir. 1980), *cert. denied*, 451 U.S. 908 (1981).

Maxus advances several arguments regarding the impropriety of issuing an injunction in this case. It argues that the injunction was prohibited under the Anti-Injunction Act, 28 U.S.C. § 2283, because it exceeds the scope of the declaratory judgment, and under the Full, Faith and Credit Act, 28 U.S.C. § 1738, because the Texas court rejected Kidder's contention that the declaratory judgment precluded the litigation of the state law

claims. It also argues that the injunction is unenforceable because it fails to inform the parties of the conduct that is forbidden.

The portion of the injunction order that prohibits Maxus from asserting federal securities law claims is not barred by the Anti-Injunction Act. That Act generally prohibits federal courts from enjoining pending state court proceedings. *Standard Microsystems Corp. v. Texas Instruments, Inc.*, 916 F.2d 58, 61 (2d Cir. 1990). The Act sets out three exceptions to that general rule, and the third, commonly-known as the "relitigation exception," is directly applicable here. *Murray v. National Broadcasting Co.*, 718 F. Supp. 249, 250 (S.D.N.Y. 1989). The relitigation exception "was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988). Well-established principles of res judicata and collateral estoppel provide the foundation for the exception. *Murray*, 718 F. Supp. at 250. Thus, the district court properly enjoined Maxus from relitigating the federal securities claims, "no matter how denominated," because those issues already had been decided. *See Staffer v. Bouchard Transp. Co.*, 878 F.2d 638, 643 (2d Cir. 1989).

We have determined that Judge Pollack erred in declaring that Maxus suffered no damages as a result of the exchange of stock. We therefore decide that the injunction exceeds the bounds of a proper declaratory judgment to the extent that it precludes litigation of the claims for damages under Texas law. Accordingly, we need not determine whether the injunction violated the Full, Faith and Credit Act, *see Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518 (1986), or whether the injunction is specific enough to inform the parties of the prohibited conduct.

CONCLUSION

We affirm in part and reverse in part and remand to the district court for modification of the judgment and injunction order in a manner consistent with the foregoing.

APPENDIX B

MDL Dkt. No. 732
Order No. 58

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M21-45-MP

IN RE IVAN F. BOESKY SECURITIES LITIGATION

---

87 Civ. 8308 (MP)

KIDDER, PEABODY & CO. INCORPORATED,
Plaintiff,

-against-

MAXUS ENERGY CORPORATION, *et al.*,
Defendants.

ORDER

Kidder, Peabody & Co. Incorporated ("Kidder") seeks a declaration that it is not liable to Maxus Energy Corporation ("Maxus"), directly or indirectly, under Sections 10(b) or 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78n(e), as amended. Maxus Corporate Company ("Maxus Corporate"), in essence, is already a party to this action. It has treated itself and been treated as the *alter ego* of Maxus. The proof submitted shows that Maxus Corporate is merely a branch, an incorporated department, of Maxus; together they are but a single enterprise. Maxus Corporate sufficiently participated in proceedings in this Court to have waived lack

of personal service of process, if indeed that was necessary under the facts and circumstances. This Court has personal jurisdiction of all the parties and jurisdiction of the subject matter and on the representations and concessions of Maxus it is appropriate so to declare.

Accordingly, the declaratory judgment to be entered herein may appropriately express Maxus' own representations and concessions, which it has proffered to assure Kidder against any assertion by Maxus or Maxus Corporate against Kidder, directly or indirectly, of a claim under federal law that Diamond Shamrock or Natomas Company's stockholders did not receive a just distribution of the stock of the merged enterprise under the distribution formula because of alleged prior misconduct of Martin A. Siegel and prior alleged insider trading by Ivan F. Boesky.

Maxus for itself and for its *alter ego* has unequivocally avowed in its representations and concessions in this Court that it has no legal claims and will not assert any legal claims under Sections 10(b) and 14(e) of the Securities Exchange Act of 1934 against the plaintiff and that it forgoes and has no intent or desire to again assert or litigate in Texas or elsewhere any federal claims against Kidder by reason of events leading up to and including the merger and the distribution of equity stock in the merged enterprise.[1] It is noted nonetheless, in apparent

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[1] In addition to the pleadings submitted by Maxus on its renewed motion to dismiss and on its motion to dismiss portions of the amended complaint as well as the pleadings submitted in the name of Maxus Corporate on its behalf by its parent Maxus on its motion to dismiss the amended complaint, Maxus has variously conceded or represented that it forgoes any such federal claims. *See e.g.*, 2/16/90 Maxus Mem. in Support of Its Motion to Dismiss the Amended Complaint (Dkt. No. 59) Exh. E (2/9/88 Kelley Affidavit) ¶ 19; 2/10/88 Maxus Mem. in Support of Its Motion to Dismiss, or, in the Alternative, to Stay Action for Declaratory Judgment (Dkt. No. 6) at 3, 12, 14; 3/24/88 Kelley Reply Affidavit (Dkt. No. 3) ¶ 6; 3/25/88 Maxus Reply Memorandum in Support of its

contradiction of its declarations for the motions herein, that the first amended orignal petition of Maxus Corporate in Texas does incorporate significant assertions relevant to a federal securities claim. The exchange ratios of the negotiated, stock for stock, distribution in the merger of Natomas and (Old) Diamond Shamrock are not subject to retroactive adjustment by Diamond Shamrock for or by its former stockholders, and certainly not by the later-created Maxus, which suffered no cognizable injury during the Natomas transactions. *See Bangor Punta Operations, Inc. v. Bangor & Aroostock R.R. Co.*, 417 U.S. 703 (1974) (in particular, see 717 n.14); *Courtland Manor, Inc. v. Leeds*, 347 A.2d 144 (Del. Ch. 1975) (in particular, see 147-49); *Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449, 455 (7th Cir. 1982), *cert. denied*, 459 U.S. 880 (1982).

Under the circumstances, a declaration here on Kidder's claim is appropriate and is granted to lay at rest the key questions raised in this case. The balance of Kidder's declaratory claims (essentially based on its fee controversy) are pendent state claims over which this Court declines jurisdiction.[2]

Motion to Dismiss or, in the Alternative, to Stay Action for Declaratory Judgment (Dkt. No. 4) at 3, 6-7; 5/5/88 Hearing Transcript (Dkt. No. 9) at 4-6, 45-46; 5/9/88 Maxus Answer (Dkt. No. 8) ¶¶ 40, 43; 2/25/90 Maxus Mem. in Support of Its Renewed Motion to Dismiss (Dkt. No. 62) at 8 (asserting that Maxus has "no legal claim whatsoever against Kidder under Section 14(e)").

[2] In granting a declaratory judgment, the Court has examined and carefully considered the following inflated submissions of the parties: 11/23/87 Kidder Complaint (Dkt. No. 1); 2/9/88 Kelley Affidavit (not separately docketed); 2/10/88 Maxus Notice of Motion to Dismiss, or, in the Alternative, to Stay Action for Declaratory Judgment (Dkt. No. 5); 2/10/88 Maxus Mem. in Support of Its Motion to Dismiss or, in the Alternative, to Stay Action for Declaratory Judgment (24 pgs.) (Dkt. No. 6); 3/9/88 Wise Affidavit (Dkt. No. 6A); 3/9/99 Kidder Mem. in Opposition to Motion to Dismiss or Stay Action (45 pgs.) (Dkt. No. 6B); 3/25/88 Kelley Reply Affidavit (Dkt. No. 3); 3/25/88 Maxus Reply Mem. in Sup-

Such a declaration moots the thorny subsidiary question whether Maxus, respectively Maxus Corporate, is the successor in interest to any such claim which is buried in an avalanche of manipulations of corporate names and

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port of Its Motion to Dismiss or, in the Alternative, to Stay Action for Declaratory Judgment (24 pgs.) (Dkt. No. 4); 4/5/88 Hearing Transcript (Dkt. No. 9); 5/10/88 Maxus Answer (Dkt. No. 8); 9/9/88 Boesky Notice of Motion for Judgment on the Pleadings (Dkt. No. 12A); 9/9/88 Boesky Mem. in Support of Motion for Judgment on the Pleadings (30 pgs.) (Dkt. No. 12B); 10/6/88 Maxus Mem. in Opposition to Boesky's Motion for Judgment on the Pleadings (44 pgs.) (Dkt. No. 13); 10/6/88 Notestine Affidavit (Dkt. No. 14); 10/7/88 Maxus Notice of Motion to Stay Boesky's Motion for Judgment on the Pleadings (Dkt. No. 15); 10/7/88 Maxus Mem. in Support of its Motion to Stay Boesky's Motion for Judgment on the Pleadings (8 pgs.) (Dkt. No. 16); 10/12/88 Boesky Reply Mem. in Further Support of Motion for Judgment on the Pleadings (26 pgs.) (Dkt. No. 17); 10/14/88 Boesky Mem. in Opposition to Maxus Motion for a Stay (6 pgs.) (Dkt. No. 18); 10/19/88 Hearing Transcript (Dkt. No. 19); 1/19/89 Kidder & Boesky Statement Pursuant to Local Rule 3(g) (Dkt. No. 20); 1/26/89 Kidder Notice of Motion for Summary Judgment or Judgment on the Pleadings (Dkt. No. 21); 2/24/89 Maxus Counter-Statement Pursuant to Local Rule 3(g) (Dkt. No. 22); 2/24/89 Notestine Affidavit (Dkt. No. 23); 1/20/89 Hearing Transcript (Dkt. No. 23A); 5/1/89 Kidder Supp.Mem. in Further Support of its Motion for Summary Judgment or Judgment on the Pleadings (21 pgs.) & Exhibits (Dkt. No. 24); 7/5/89 Maxus Supp.Mem. in Opposition to Pending Motions for Summary Judgment or Judgment on the Pleadings (35 pgs.) (Dkt. No. 27); 7/24/89 Bricker Affidavit (Dkt. No. 28); 8/15/89 Kidder Supp. Reply Mem. in Further Support of Its Motion for Summary Judgment or Judgment on the Pleadings (30 pgs.) & Exhibits (Dkt. No. 30); 10/11/89 Hearing Transcript (Dkt. No. 36); 12/21/89 Maxus Renewed Motion to Dismiss (Dkt. No. 38); 12/21/89 Maxus Mem. in Support of its Renewed Motion to Dismiss (30 pgs.) & Exhibits (Dkt. No. 37); 1/11/90 Maxus Supp.Mem. in Opposition to the Revised Motion for Summary Judgment on the "Title" Issues (46 pgs.) & Exhibit Binder & Fretthold Deposition (Dkt. No. 40); 1/11/90 Maxus Supp. Counter-Statement Pursuant to Local Rule 3(g) (Dkt. No. 41); 1/16/90 Kidder Notice of Motion to Amend Complaint to Add a Party (Dkt. No. 42); 1/16/90 Kidder Mem. in Support of Motion to Amend Complaint to Add a Party (13 pgs.)

assignments of the Diamond Shamrock enterprises and as to which it is highly doubtful that Maxus Corporate, respectively Maxus, is such successor any longer.

While use of the "Corporate" title in the caption in addition to "Energy" would have obviated the vast paper chase reflected in the margin in footnote 2, it was not substantively essential. Maxus and its lawyers concede that they understood in 1987 from Kidder's counsel that the *alter ego*, Maxus Corporate, was intended to be included under the umbrella of Maxus. The latter and its *alter ego* participated in proceedings herein which ostensibly covered both, until some seemingly disadvantage was perceived and a separation became a useful ploy.

& Exhibits (Dkt. No. 43); 1/16/90 Kidder Supp.Mem. in Support of Its Motion for Summary Judgment on the "Title" Issue (29 pgs.) & Exhibits (Dkt. No. 44); 1/16/90 Nadler Affidavit (9 pgs.) (Dkt. No. 45); 1/19/90 Kidder Supp. Statement Pursuant to Local Rule 3(g) (Dkt. No. 46); 1/22/90 Kidder Mem. in Opposition to Renewed Motion to Dismiss (32 pgs.) & Exhibits (Dkt. No. 47); 1/25/90 Maxus Mem. in Response to Motion to Amend to Add a Party (10 pgs.) (Dkt. No. 48); 1/25/90 Hinshaw Affidavit (12 pgs.) (Dkt. No. 49); 2/2/90 Kidder Amended Complaint (Dkt. No. 53); 2/9/90 Maxus Supp. Papers in Opposition to Revised Motion for Summary Judgment on the "Title" Issue (32 pgs.) (Dkt. No. 54); 2/15/90 Maxus Notice of Motion to Dismiss Claims Under §§ 10(b) and 14(e) (Dkt. No. 55); 2/15/90 Maxus Mem. in Support of Its Motion to Dismiss Claims Under §§ 10(b) and 14(e) (17 pgs.) & Exhibit Binder (Dkt. Nos. 56 & 57); 2/16/90 Maxus Corporate Notice of Motion to Dismiss (Dkt. No. 58); 2/16/90 Maxus Corporate Mem. in Support of Its Motion to Dismiss the Amended Complaint (30 pgs.) & Exhibit Binder (Dkt. No. 59); 2/22/90 Kidder Summary Mem. in Support of Its Motion for Summary Judgment on the "Title" Issue (15 pgs.) (Dkt. No. 60); 2/25/90 Maxus Reply Mem. in Support of Its Renewed Motion to Dismiss (27 pgs.) (Dkt. No. 62); 2/26/90 Kidder Mem. in Opposition to Motion to Dismiss Claims Under §§ 10(b) and 14(e) (4 pgs.) & Exhibits (Dkt. No. 63); 2/26/90 Kidder Mem. in Opposition to Maxus Corporate Motion to Dismiss the Amended Complaint (54 pgs.) & Exhibits (Dkt. No. 64); 3/7/90 Maxus Reply Mem. on Motion to Dismiss Claims Under §§ 10(b) and 14(e) (3 pgs.) (Dkt. No. 67); 3/7/90 Maxus Corporate Reply Mem. on Motion to Dismiss Amended Complaint (40 pgs.) (Dkt. No. 68).

The federal claims herein on which Kidder seeks a declaratory judgment that it is entitled to indemnification and contribution from defendant Boesky and the Boesky entities on the part of Kidder from any claims arising in favor of Diamond Shamrock from alleged trading in Natomas stock are dismissed for failure to state a claim upon which relief may be granted.

Submit a form of declaratory judgment accordingly, on notice, within 10 days hereof, after conference of counsel with respect to any objections as to form.

SO ORDERED.

Dated: March 26, 1990

MILTON POLLACK
Senior United States District Judge

APPENDIX C

MDL Dkt. No. 732

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M21-45-MP

IN RE IVAN F. BOESKY SECURITIES LITIGATION

---

87 Civ. 8308 (MP)

KIDDER, PEABODY & CO. INCORPORATED,
Plaintiff,

-against-

MAXUS ENERGY CORPORATION, *et al.*,
Defendants.

DECLARATORY JUDGMENT

[Filed Apr. 12, 1990]

The controversies in this action having been presented for declaratory judgment on motion by plaintiff Kidder, Peabody & Co. for summary judgment; motion by defendant Ivan F. Boesky for judgment on the pleadings; motions by defendant Maxus Energy Corporation to dismiss this action and to dismiss claims of the amended complaint; and motion by defendant Maxus Corporate Company to dismiss the amended complaint; and such motions having duly come on for hearing; and due deliberation having been had; and the Court having duly made and filed its decision dated March 26, 1990, directing a declaratory judgment as hereinafter provided, it is:

ADJUDGED and DECREED that the rights of the plaintiff and of the defendants with respect to the subject matters of the above-entitled action are as follows:

1. Controversies exist herein over which the Court has subject matter jurisdiction;

2. The Court has personal jurisdiction over all the parties hereto;

3. Maxus Corporate Company has treated itself and been treated as the *alter ego* of Maxus Energy Corporation; Maxus Corporate Company is merely a branch, an incorporated department, of Maxus Energy Corporation; together they are but a single enterprise, and Maxus Corporate Company's participation in proceedings in this Court has sufficiently amounted to a waiver of lack of personal service of process *ab initio*;

4. Maxus Energy Corporation and Maxus Corporate Company have expressly represented and conceded in open court that neither has or may assert at any time hereafter, directly or indirectly, against Kidder, Peabody & Co. any claims under Section 10(b) or 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78n(e), as amended, with respect to the Combination of Natomas Company and Diamond Shamrock, or the incidents thereof, including claims that they or any of their stockholders did not receive, under the distribution formula, a just distribution of the equity stock of the new holding company, in which Diamond Shamrock and Natomas Company were combined and became subsidiaries, because of alleged prior misconduct of Martin A. Siegel and prior alleged insider trading by Ivan F. Boesky with respect to Natomas Company or its stock;

5. The exchange ratios of the negotiated, stock for stock, distribution of the equity stock of the new holding company to the stockholders of Natomas Company and (Old) Diamond Shamrock Corporation are not subject to retroactive adjustment on claims by Diamond Shamrock

on behalf of itself or its former stockholders that excessive payments were made to Natomas Company stockholders, or otherwise, and may not be challenged by Maxus Energy Corporation or its *alter ego* Maxus Corporate Company, which were created subsequent to the alleged insider trading and suffered no cognizable injury therefrom;

6. The claims herein by Kidder, Peabody & Co. against defendant Ivan F. Boesky and the so-called Boesky enties (collectively "Boesky") that, if Kidder, Peabody & Co. is held to be liable to Maxus Energy Corporation or Maxus Corporate Company in whole or in part on any of Maxus Energy Corporation or Maxus Corporate Company's claims arising from the combination of Natomas Company and Diamond Shamrock, Kidder, Peabody & Co. is entitled to a judgment against Boesky indemnifying Kidder, Peabody & Co. or granting it contribution from Boesky for any such judgment is dismissed for failure by Kidder, Peabody & Co. to state a claim on which relief can be granted, because neither Maxus Energy Corporation nor Maxus Corporate Company has or may assert such claims;

7. The balance of Kidder, Peabody and Co.'s claims to declaratory relief, essentially based on its fee controversy with Diamond Shamrock, are pendent state claims over which this Court declines to exercise jurisdiction; and

8. The Court retains jurisdiction hereof to the extent necessary to effectuate this judgment.

Dated: April 12, 1990

/s/ Milton Pollack
MILTON POLLACK
Senior United States District Judge

JUDGMENT ENTERED:

Raymond F. Burghardt
4/13/90

APPENDIX D

Order No. 64
MDL Dkt. No. 732

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M21-45-MP

IN RE IVAN F. BOESKY SECURITIES LITIGATION

---

87 Civ. 8308 (MP)

KIDDER, PEABODY & CO. INCORPORATED,
Plaintiff,

-against-

MAXUS ENERGY CORPORATION, MAXUS CORPORATE COMPANY, MARTIN A. SIEGEL, IVAN F. BOESKY and JOHN DOES 1-10,
Defendants.

INJUNCTION ORDER

APPEARANCES:

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Attorneys for Defendant
Maxus Energy Corporation

Milton Pollack, Senior United States District Judge

The stock for stock exchange merger formula was a barrier to any recovery anywhere on a claim of an alleged underpayment to Diamond Shamrock by reason of disclosure of inside information resulting allegedly in an inflated value of Natomas stock, no matter what form of relief might be sought thereon.

That exchange swept away all claims affecting the value of the stock accepted in the merger including any previously existing choses in action of the parties to the merger, however denominated and wherever asserted or attempted to be asserted by a party to the exchange. Any claims, no matter whether denominated federal or state challenging the consideration paid to Diamond Shamrock necessarily and fundamentally rests on the same nucleus of operative fact.

This was made clear beyond peradventure of doubt by the allusion to the *Bangor Punta* doctrine in the Court's opinion (p. 3) and paragraph "5" of the declaratory judgment.

This Court had primary jurisdiction as well as pendent jurisdiction of the factual controversies so laboriously presented by the parties, as well as jurisdiction over the parties. Any forms of relief arising from the merger formula as well as what led up to it, whether denominated primary or pendent was embraced by the ruling. The issue was expressly argued at the hearing. The judgment is presently outstanding, unreversed.

Semantic adroitness will not serve to obscure what was litigated, argued and then decided in this Court. It was to avoid the perceived danger of just such "mistaken" notions and semantic adroitness with which this and the state court are being plied, that a declaratory judgment seemed necessary and was granted.

Hopefully, the nearby determination of the validity of the declaratory judgment by the Second Circuit Court of

Appeals in which an appeal is pending, will lay to rest any perceived errors of the judgment herein. The injunction is granted to keep status quo and to aid the appeal, awaiting its results.

Relitigation of the issues decided in the declaratory judgment as set forth therein is specifically enjoined pending disposition of the declaratory judgment on appeal and Maxus Energy Corporation, Maxus Corporate Company, their attorneys, officers and agents are enjoined from proceeding in state court or any where else pending resolution of said appeal.

New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1350 (2d Cir. 1989). *See generally United States v. International Bhd. of Teamsters*, slip op. at 4852-56 (2d Cir. June 27, 1990); *Horn & Hardart Co. v. National Rail Passenger Corp.*, 843 F.2d 546, 548 (D.C. Cir.), *cert. denied*, 109 S.Ct. 129 (1988); *Plaquemines Parish Comm'n Council v. United States*, 416 F.2d 952, 954 (5th Cir. 1969); *Overtime Transp. Co. v. Chicago Indus. Tire Co.*, 697 F.2d 789, 792 (7th Cir. 1983); *United States v. Board of School Comm'rs*, 503 F.2d 68, 81 (7th Cir. 1974) *cert. denied sub nom. Bowen v. United States*, 421 U.S. 929 (1975); *Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955, 956 (9th Cir. 1983); *Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976); *National Service Indus., Inc. v. Vafla Corp.*, 694 F.2d 246, 250 (11th Cir. 1982); *BGW Assocs. v. Valley Broadcasting Co.*, 532 F. Supp. 1115, 1116-17 (S.D.N.Y. 1982); *In re Ocean Ranger Sinking Off Newfoundland*, 617 F.Supp. 435, 438-39 (E.D. La. 1985); *Hayward v. Clay*, 456 F.Supp. 1156-61 (D.S.C. 1977).

Settle order on two (2) days notice returnable July 23, 1990.

Dated: New York, NY
July 18, 1990

SO ORDERED

MILTON POLLACK
Senior United States District Judge

APPENDIX E

MDL Dkt. No. 732
Order No. 65

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M21-45-MP

IN RE IVAN F. BOESKY SECURITIES LITIGATION

---

87 Civ. 8308 (MP)

KIDDER, PEABODY & CO. INCORPORATED,
Plaintiff,

-against-

MAXUS ENERGY CORP., *et al.*,
Defendants.

INJUNCTION ORDER

This Court having entered an Order dated March 26, 1990, and a Declaratory Judgment dated April 12, 1990; and having been informed of proceedings in another jurisdiction relating to the subject matter of that Order and Declaratory Judgment; and having been presented with a motion by Kidder, Peabody & Co. Incorporated ("Kidder") and Ivan F. Boesky ("Boesky") for injunctive and other relief and a motion by defendants Maxus Energy Corporation and Maxus Corporate Company ("the Maxus parties") to strike the motion of Kidder and Boesky or, in the alternative, to stay proceedings on the motion by Kidder and Boesky; and such motions having duly come

on for hearing; and due deliberation having been had; and the Court having duly made and filed its decision and injunction order dated July 18, 1990, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. This Court has authority to issue injunctive relief to protect and effectuate its Order and Declaratory Judgment pursuant to 28 U.S.C. §§ 1651, 2202 and 2283 and its inherent power.

2. This Court expressly retained jurisdiction of this matter to the extent necessary to effectuate its Declaratory Judgment dated April 12, 1990. The ruling herein is necessary to preclude relitigation of the issues decided in the Declaratory Judgment as set forth therein. In addition, it will aid in resolution of the pending appeal of the Declaratory Judgment and other prior orders of the Court by preserving the status quo and protecting the rights of all parties pending disposition of that appeal.

3. The Maxus parties and their attorneys, officers, agents, and affiliates are hereby enjoined from asserting, attempting to assert, or pursuing, in state court or anywhere else, any claim or cause of action or forms of relief arising from the merger exchange formula, as well as what led up to it, in the stock-for-stock merger of (Old) Diamond Shamrock Corporation and Natomas Company, whether such claims, causes of action, or forms of relief are denominated as federal or state, or whether they are characterized as overpayment to or for the benefit of Natomas or its shareholders or employees or their successors, or as excessive payment for or losses in the value of Natomas stock or assets, or as payments in respect of Natomas obligations, or as underpayment to or dilution of the stock of Diamond Shamrock or Maxus Energy Corporation, or as otherwise characterized.

4. This injunction shall remain in effect pending resolution of the Maxus parties' appeal from the Declaratory Judgment and further order of this Court.

5. The motion of the Maxus parties to strike the motion of Kidder and Boesky or to stay proceedings on Kidder's and Boesky's motion is hereby denied.

6. The Court retains jurisdiction hereof to the extent necessary to enforce this injunction.

DATED: New York, New York
July 23, 1990

/s/ Milton Pollack
Senior United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the city of New York, on the fourteenth day of March, one thousand nine hundred and ninety-one.

Docket Numbers 90-7487, 7657

KIDDER, PEABODY & COMPANY INCORPORATED,
Plaintiff-Appellee,

-v.-

MAXUS ENERGY CORPORATION, MAXUS CORPORATE COMPANY, MARTIN A. SIEGEL, JOHN DOES 1-10, and IVAN F. BOESKY,
Defendants,

MAXUS ENERGY CORPORATION, MAXUS CORPORATE CO.,
Defendants-Appellants,

IVAN F. BOESKY,
Defendant-Appellee.

Petitions for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiff-appellee, Kidder, Peabody & Co. Incorporated and defendant-appellee, Ivan F. Boesky.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petitions for rehearing are DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

/s/ [Illegible]
Chief Deputy Clerk